(1)

91-1776

Supreme Court, U.S.
FILED
MAY 4 1992
OFFICE OF THE CLERK

No.

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1991

ANN ERWIN, et al and ROBERT PETIT, et al.
Petitioners,

v.

CITY OF CHICAGO, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Kimberly A. Sutherland
180 West Washington Street
Suite 700
Chicago, IL 60602
(312) 726-0045

Counsel for Petitioners
Counsel of Record

April 30, 1992

QUESTIONS PRESENTED

WHETHER ALLEGATIONS IN COMPLAINTS CHARGING REVERSE DISCRIMINATION IN POLICE DEPARTMENT PROMOTIONS STATE A CAUSE OF ACTION FOR VIOLATION OF

(a) THE EQUAL PROTECTION CLAUSE, AND

(b) A CHICAGO ORDINANCE MANDATING THAT PROMOTIONS MUST BE BASED UPON MERIT, WHERE PETITIONERS ALLEGE THAT THE CITY OF CHICAGO UNDERTOOK FACIALLY NEUTRAL, BUT RACIALLY MOTIVATED, MANIPULATIONS OF TEST RESULTS, TO INCREASE THE NUMBER OB BLACKS AND HISPANICS PROMOTED AND LESSEN THE NUMBER OF WHITES PROMOTED.

L I S T O F P A R T I E S

The parties are listed in Footnote #1 at the end of this petition.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES .....ii, p.45, n.1

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 2

STATUTES INVOLVED 3

STATEMENT OF THE CASE 6

REASONS FOR GRANTING THE WRIT 18

Allegations in complaints charging reverse discrimination in police department promotions, state a cause of action for violation of: a) the Equal Protection Clause and b) a Chicago ordinance mandating that promotions must be based upon merit, where petitioners allege that the City of Chicago undertook facially neutral, but racially motivated, manipulations of test results to increase the number of blacks and Hispanics promoted and lessen the number of whites promoted.

(a) Violation of Equal Protection ... 19

(b) Violation of Chicago ordinance... 33

CONCLUSION 44

APPENDIX follows

T A B L E O F A U T H O R I T I E S

Page

Cases:

Bell v.Civil Service Com'n,161 Ill. App. 3d 644, 515 N.E.2d 248 (1987)... 37

Connecticut v. Teal, 457 U.S.440, 102 S.Ct.2525,2535 (1982)..... 20

Cousins v. City Council of Chicago, 466 F.2d 830 (7th Cir. 1960).....27,28

Dodge v. Board of Education of Chicago, 302 U.S. 74, 78-79 (1937)... 41

Duldulao v.St.Mary of Nazareth Hosp., 115 Ill.2d 482,505 N.E.2d 314(1987).. 39

Farmer v. McClure, 172 Ill.App.3d 246, 526 N.E.2d 486 (1988)..... 38

Felle v. Metropolitan Sanitary Dist., 520 N.E.2d 1012 (1988)..... 37

Fernandez v. Margolis, 558 N.E.2d 699, 701 (1990)..... 38

Gomillion v. Lightfoot, 364 U.S. 339, 347 (1960)..... 27

Hoffman v. Bd. of Fire and Police Com'rs, 529 N.E. 2d 790 (1988)..... 38

Kren v. Civil Service Comm. of Springfield, 574 N.E.2d 1289 (4th Dist.1991) 42

Levitt v. Gorris, 167 Ill.App.3d 88 (1988).....41,42

Majeske v. City of Chicago, 740 F.Supp. 1350, 1355 (N.D. Ill. 1990).. 37

Meredith v. Fair, 298 F.2d 696, 701 (5th Cir. 1962) cert. denied, 371 U.S. 828..... 22

Muellner v. Mars, Inc., 714 F. Supp. 351, 360-361 (N.D.Ill. 1989)..... 39

New York City Transit Authority v. Beazer, 440 U.S. 568, 587-88, 99 S.Ct. 1355, 1369 (1979)..... 31

Palmer v. Thompson, 403 U.S. 217, 224-226 (1970)..... 26

Peoria Police Sergeants v. City of Peoria bd. of Fire & Police Comm., 574 N.E.2d 1240 (3rd Dist. 1991)..... 42

Personnel Adm'r of Massachusetts v. Feeney, 442 U.S. 256, 99 S.Ct. 2282, 2292-93 (1979) 26

Shakman v. Democratic Organization of Cook County, 481 F.Supp. 1315, 1338 (N.D.Ill. 1979)..... 26

Sullivan v. Board of Fire and Police Com'rs, 103 Ill.App.3d 167, 430 N.E.2d 636 (1981)..... 38

United States v. City of Chicago, 385 F. Supp. 543, 1974)..... .47,n.2

United States v. City of Chicago, 411 F. Supp. 218, (1976)..... 47,n.2

United States v. City of Chicago, 420 F. Supp. 733, (1976)..... 47,n.2

United States v. City of Chicago,
549 F.2d 415, (7th Cir. 1977). 7,47,n.2

United States v. City of Chicago,
567 F.2d 730, (7th Cir. 1977) ... 47,n.2

United States v. City of Chicago,
631 F.2d 469, (7th Cir. 1980) 47,n.2

United States v. City of Chicago,
663 F.2d 1354, (7th Cir. 1981) ...47,n.2

United States v. City of Chicago,
796 F.2d 205, (7th Cir. 1986) 47,n.2

United States v. City of Chicago,
853 F.2d 572, (7th Cir. 1988).....47,n.2

United States v. City of Chicago
(Earth, intervening appellee),
869 F.2d 1033 (7th Cir. 1989) cert.
denied 58 U.S.L.W. 3217 (1989)..... 40

United States v. City of Chicago,
870 F.2d 1256, 1258 (7th Cir.1989)... 23

United States v. City of Chicago,
894 F.2d 943, 949, (7th Cir. 1990)... 36

Vil of Arlington Hts. v. Metro Dev.,
429 U.S. 252, 97 S.Ct. 555, 563-565
(1977)..... 27

Washington v. Davis, 426 U.S. 244,
96 S.Ct. 2040, 2050, n.11..... 26

Statute and Ordinance:

42 U.S.C. Sec. 1983.....3,6,19

Chicago Municipal Code Ch. 2-74.... 3,33

OPINIONS BELOW

The unsigned opinion of the Court of Appeals for the Seventh Circuit and its order denying rehearing are not reported. They are reprinted in the Appendix (1a, 3a).

The order of the United States District Court Judge Prentice Marshall and the report of the Magistrate Elaine Bucklo, whose reasoning the District Court had adopted, are not reported. They are reprinted in the Appendix (18a, 30a, 37a).

J U R I S D I C T I O N

This is a petition for a writ of certiorari to the Court of Appeals for the Seventh Circuit, to reveiw the judgment entered on December 13, 1991, for which a petition for rehearing was denied on February 4, 1992. The Court of Appeals affirmed the District Court's order of October 26, 1990 dismissing certain allegations of ERWIN and PETIT petitioners' First Amended Intervenors' complaints.

This Court has jurisdiction under 28 U.S.C 1254(1).

S T A T U T E S I N V O L V E D

42 U.S.C. Sec. 1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other persons within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Chicago Municipal Code (formerly Sec. 25.1-8 et seq., now ch. 2-74):

2-74-010 Purpose of provisions.

It is the general purpose of this ordinance, and it is necessary in the public interest, to establish a system of personnel adminstration that meets the social economic and program needs of the people of the city of Chicago, to provide for a professional and progressive merit system for employment, and to insure flexible career service within the city of Chicago.

2-74-050 Personnel rules.

The commissioner of personnel shall issue personnel rules....The rules shall provide:

. . .

(4) For the establishment of eligible lists for appointment and promotion in career service, upon which lists shall be placed the names of successful candidates in order of their relative excellence in the respective examinations . . .

. . .

(6) For promotions which shall give appropriate considerations to the applicant's qualifications, record of performance and ability.

. . .

2-27-070 Discrimination-Unlawful activities

No person shall discriminate against any employee or applicant for employment because of race... color... ...national origin.

City Personnel Rules:

RULE V - EQUAL EMPLOYMENT OPPORTUNITY

The Commissioner of Personnel shall be responsible for maintaining a program of equal employment opportunity. This shall include:

. . .

3. Development and implementation of programs within the Department of Personnel to provide equality of opportunity for employment in City government without respect to race, color...national origin....

RULE VI - EXAMINATIONS

Section 4 - Weighting and Rating of Tests and Examinations

The Commissioner of Personnel shall establish the weighting for the various parts of examinations based on job-related factors as determined by analysis of duties and requirements for the position.

Appropriate techniques and procedures based on merit principles shall be used in determining the weighting of separate tests in an examination, in evaluating the results of examinations, and in determining the relative ratings or rankings of the competitors. The determination of appropriate written, oral and performance tests, of methods of evaluating experience and training, and of weights to be assigned to various parts of an examination, shall be made by the Commissioner of Personnel.

S T A T E M E N T O F T H E C A S E

Jurisdiction of District Court

The present cases were brought in federal court pursuant to 42 U.S.C 1981, 1983, 1985(3) and 1986. The District court had jurisdiction of these cases under 28 U.S.C. 1331 and 1343, and under pendent jurisdiction over the state law claims.

History of racial preferences

The CITY OF CHICAGO's (CITY) manipulations of its current police promotion tests at issue here, to give preferences to blacks and Hispanics, were the most recent installments in a 20-year history of such preferences in hiring and promotion. [2]/

---

[2]/ Footnotes are at end.

The racial preferences continued for 20 years based only upon recurring disparate impact on test results, and not based upon disparate treatment of blacks and Hispanics. The District Court's initial finding of knowing discrimination against minorities, made in 1976, was reversed on appeal. Petitioners call attention to the first paragraph of the Court of Appeal's unsigned Order in the present cases, where it misstated the law of its own circuit, when it wrote that "[District Court] Judge Marshall...had held that the City was knowingly discriminating against blacks,Hispanics..." (App.4a). Apparently the Court was unaware that this holding had been reversed in United States v. City of Chicago, 549 F.2d 415,435 (7th Cir.1977).

The present complaints

The ERWIN petitioners are Chicago police sergeants challenging the racial adjustments to the most current lieutenants' test in their First Amended Intervenors' Complaint (BigbyNR 393, 394) [3]. The PETIT petitioners are Chicago police patrol officers challenging the racial adjustments to the most current sergeants' test in their First Amended Intervenors' Complaint (USNR 1890) [4]. Both the sergeants' and lieutenants' tests consisted of three components: a written multiple choice, written short answer, and an oral board.

The petitioners are largely white officers, and include men and women; the CITY classified white women together with white men as "whites". Petitioners include Asian and American Indian

officers, because the CITY classified Asians and American Indians as "whites". Black and Hispanic officers have joined in the present complaints, because the CITY's manipulations of test results to increase the sheer numbers of blacks and Hispanics promoted, harmed various individual test candidates of all races. Those individuals, including the minorities, would have placed higher on the promotion lists if the CITY had evaluated test results and had weighted test components according to its job analysis and merit principles.

In their First Amended Intervenors' Complaints at issue here, the ERWIN and PETIT petitioners challenged the following facially neutral, but racially motivated manipulations of the test results: discounting or deleting valid questions, retaining invalid items, and

overweighting the oral board. On the lieutenants' test, stark examples include retaining question #2 on the multiple choice component, even though the answer key nad no right answer, and giving the 11-question oral board 80% weight, while virtually discounting the 74 questions of the two written components. (BigbyNR 393, pars.24.C,39(1))

In Count I of their complaints, petitioners claimed that the facially neutral manipulations were a violation of the equal protection clause because they were undertaken with the discriminatory motive of decreasing tne number whites promoted and increasing the numbers of blacks and Hispanics promoted. In Count II of their complaints, petitioners claimed tnat these manipulations were a violation of

a local ordinance because they were not legitimate, but were done contrary to the job analysis and merit principles.

The following are introductory paragraphs in the ERWIN complaint (lieutenants' test) which were not striken (petitioners, who were intervenors, refer to the plaintiff class of black sergeants as the "the Bigby plaintiffs"):

ERWIN First Amended Intervenors' Complaint:

COUNT I
Violation of Equal Protection

> 23. The CITY and its agents acting in concert with the Bigby plaintiffs' attorneys Kenneth Flaxman and Stephen Seliger, under color of state law, manipulated the results of the 1987-88 lieutenants' test on the basis of race purportedly to favor blacks and hispanics, to the detriment of white and minority plaintiffs ... so that plaintiffs' final test scores were artificially reduced causing them to be placed lower on the 1988 lieutenants' list than they would have placed otherwise, thereby depriving plaintiffs of

their right to equal protection of the law....

24. In furtherance of the aforedescribed conspiracy, for the stated purpose of increasing the numbers of minorities, the CITY and the Bigby plaintiffs' attorneys virtually eliminated the first two parts of the test, the multiple choice and short answer sections and altered the raw scores of the short answer and oral board components through "rater/race standardization". As set forth fully in par. 39 of this complaint, the first two parts were the only parts of the examination that were recorded and had legitimate rating forms. White plaintiffs ... and minority plaintiffs ... had high scores on these two parts of the examination. The effect of the race-conscious acts of making the multiple choice pass/fail with a meaninglessly low cut-off score, and counting the illegitimate, unrecorded oral board 80% of the final score, was to penalize qualified minorities and whites who had high scores on the first two parts of the examination, and to place many unqualified minorities and whites high on the eligibility list....

The following paragraphs of the ERWIN complaint, Count I, were striken, and are the subject of the appeal:

ERWIN First Amended Intervenors' Complaint:

24. A. Elimination of Multiple Choice

1. Before the test was given, the CITY decided to make the the first component, the 63-question multiple choice section, pass/fail because the BIGBY plaintiffs feared that minorities would do poorly on it:

> "The decision to utilize the multiple choice test only on a pass/fail basis was a response, in part, to the [BIGBY] plaintiffs' concern that such tests generally show an adverse impact against minorities if used on a rank order basis"...

2. Although the CITY's memos show that it intended to use the 63 question multiple choice as a screening device to eliminate half of the test takers, after the results were in, the CITY and Bigby plaintiffs' attorneys set the pass fail cut-off score at 48 out of 63, for the stated purpose to avoid screening out minorities:

> "in consultation with plaintiffs' counsel, a pass/fail cut-off score was

set at a level that did not show adverse impact against minorities..."...

The 48 cut-off score eliminated only 127 out of 1016 test-takers. A score of 56 would have screened out half of the test takers (Exhibit I). By screening out only 12% of the test takers, these parties made the multiple choice a meaningless exercise rather than a true screening process.

24.C.80% Weight Given to Oral Board

1. Although the CITY's memos show that the architects of the test had advised that the remaining two components, short answer and oral board, should be weighted equally, and that the proper time to assign weights was before the examination was announced and scored, after the results of the test were tabulated, the CITY instead decided to give the short answer 20% weight and the oral board 80% weight for the purpose of eliminating whites from the list, but with the effect of eliminating qualified whites and qualified minorities ....

Also striken were paragraphs 39 (l) and (m) of Count I of the ERWIN complaint, where petitioners described

particular questions on the multiple choice and the oral board which were retained even though they had wrong answers in the rating forms, or were otherwise invalid.

For Count I (equal protection) of the PETIT complaint challenging the sergeants' test, the petitioners knew little of the facially neutral adjustments at the time they filed their First Amended Intervenors' Complaint, because the District Court had stayed discovery. However, petitioners did know that 30 of the 80 multiple choice questions had been eliminated, and so alleged in the following striken paragraph of their COUNT I:

PETIT First Amended Intervenors' Complaint:

> 19. (f) (2) after seeing the results of the multiple choice portion of the examination, the CITY eliminated 30 questions from

> the multiple choice portion of the examination on the ground that some were too difficult and others were not related to tasks performed by sergeants, even though most of the questions were related to tasks performed by sergeants and the CITY had previously determined that they were so related to the sergeant's job before it saw the test results ....

In the pendant COUNT II's of both the ERWIN and PETIT complaints, petitioners realleged all the fact allegations of their respective Count I's, and alleged that the CITY violated its own ordinance and rules by its conduct.

Disposition by the District Court

The District Court adopted the Magistrate's recommendation to dismiss the allegations of both the ERWIN and PETIT complaints attacking the facially neutral manipulations. [5]/ (BigbyNR 524, 527,USNR 2077,2078; App.19a,27a-29a, 30a-41a)

Disposition by Court of Appeals

The Court of Appeals refused to consider the merits of petitioners' challenge to the facially neutral manipulations, citing the brevity of their argument for the equal protection theory, and overlooking their theory that the manipulations were a violation of a local ordinance. (App. 13a, 14a, 16a, 17a)

The pertinent portions of the argument of the Brief of Appellants filed in the Court of Appeals are quoted verbatim within the following pages of this petition.

REASONS FOR GRANTING THE WRIT

ALLEGATIONS IN COMPLAINTS CHARGING REVERSE DISCRIMINATION IN POLICE DEPARTMENT PROMOTIONS, STATE A CAUSE OF ACTION FOR VIOLATION OF (a) THE EQUAL PROTECTION CLAUSE, AND (b) A CHICAGO ORDINANCE MANDATING THAT PROMOTIONS MUST BE BASED UPON MERIT, WHERE PETITIONERS ALLEGE THAT THE CITY OF CHICAGO UNDERTOOK FACIALLY NEUTRAL, BUT RACIALLY MOTIVATED, MANIPULATIONS OF TEST RESULTS TO INCREASE THE NUMBER OF BLACKS AND HISPANICS PROMOTED AND LESSEN THE NUMBER OF WHITES PROMOTED.

(a)

VIOLATION OF EQUAL PROTECTION UNDER 42 U.S.C. 1983

Importance of Issue

The equal protection issue presented in this petition is a matter of exceptional importance. The issue is whether whites, in a reverse discrimination case, may challenge facially neutral, but racially motivated, employment decisions. The District Court held that petitioners could not plead such a cause of action. The Court of Appeals summarily affirmed.

Nevertheless, in contradiction to the affirmance, one of the judges of the Court of Appeals, Judge Frank Easterbrook, eloquently advocated petitioners' equal protection claim in his colloquy with the CITY's attorney in the following excerpt from the oral

argument heard on September 19, 1991: [6]/

> Judge Easterbrook: "Suppose what is going on, is that the CITY goes through and sees how these test scores are coming in, and observes that on item #5 whites do real well and blacks do real poorly, and the CITY then triples the weight that is attached to item #5, all right, so that it gives whites a boost, and the blacks come in and say you know you can't play that kind of game, that's exactly the game that all the Southern states played, to get out of the ground, and it doesn't work, would you say, as your're saying to us, that they have no claim, no standing, they can't even litigate that, that's what you're saying to us....
>
> "....Connecticut v. Teal [457 U.S. 440, 102 S.Ct. 2525,2535 (1982)] says you can't make a bottom line decision, you have to defend your behavior on each thing which your're challenging. It sounds like you're making a bottom line decision.
>
> "....you [the CITY] say this is done to avoid disparate impact, that sounds like a bottom line defense.

"....Suppose you draw a group in which there are a hundred qualified white applicants and no qualified black applicants. What you'll do is you'll just jigger the numbers to make sure that they pass at the same rate and then you'll say no claim can be made at all because you're just making sure they pass at the same rate. But if you're treating the persons as individuals, that's about as stark a form of discrimination as you can imagine. Why do you then come and say no you cannot even consider an attack on that?"

As Judge Easterbrook suggested during oral argument, the wielding of political power against whites because of their race is as equally repugnant as it has been against the previous victims of racial animus.

In a historic case, the Court of Appeals for the Fifth Circuit held that a black candidate for admission to college stated a cause of action for violation of equal protection in his challenge to the "superficially

innocuous" entrance requirement of six letters from alumni, where the intent was to bar blacks from admission, Meredith v. Fair, 298 F.2d 696, 701 (5th Cir. 1962) cert. denied, 371 U.S. 828.

The principle enunciated in Meredith should not be disregarded because the race of the victim has changed. In Chicago, the population is nearly 60% black and Hispanic, and the racial manipulations of promotion lists at issue in the present cases were contrived by the administrations of two black Chicago mayors and two black Chicago police superintendents.

The Civil Rights Act of 1991 expressly proscribes overt racial adjustments such as altering scores. District Court Judge Prentice Marshall's decision in the present case invites employers acting with improper motives

to subvert the intent of the Act by using invalid, superficially neutral manipulations to force racial balance, to the detriment of qualified employees of all races. Judge Marshall's decision invites employers to use the equivalent of 'arm wrestling contests' to hire or promote, as he actually suggested when he allowed the CITY to promote from the lieutenants' list at issue here:

> ...'"all I am really interested in is whether the pool out of which the City promotes is a non discriminatory pool. I don't care how you select the 200 [the number of sergeants to be promoted to lieutenant]. You can have them arm wrestle or anything else, see."'

Judge Marshall, quoted in U.S. v. City, 870 F.2d 1256, 1258 (7th Cir. 1989).

The District Court's decision sanctions social engineering in the guise of civil rights, to achieve the unconstitutional goal of equality of results rather than equality of opportunity.

Refusal of the Court of Appeals to consider argument

The Court of Appeals stated that petitioners failed to make their contention and support it. Nevertheless, petitioners made their contention and cited the pertinent cases, in a terse and simple fashion pursuant to the directives for brief writing that are prepared and distributed by the judges of the Court of Appeals for the Seventh Circuit.

The following is the portion of the Brief of Appellants filed in the Court of Appeals, pp. 14-15, on the equal protection theory, quoted verbatim, which petitioners present for a dual purpose, first, to serve as their argument for this petition, and second, to show their argument in the Court of Appeals was appropriate:

Excerpt From Brief of Appellants, pp. 14-15:

"FACIALLY NEUTRAL DECISIONS MOTIVATED BY A RACIALLY DISCRIMINATORY PURPOSE, AND HAVING INTENDED RACIAL IMPACT, ARE A VIOLATION OF EQUAL PROTECTION.

"The district court found that CITY did not violate the equal protection clause and left everybody in the same boat when, with a race-based animus to decrease the number of whites promoted, they gave the oral boards the greatest weight, deleted questions from the test, and kept unreliable items. The CITY not only did not leave everyone in the same boat by this conduct, they intentionally threw many whites overboard.

Continuation of excerpt from Brief:

"An earlier Supreme Court ruling, Palmer v. Thompson, 403 U.S. 217, 224-226 (1970), is no longer the law, in so far as it the holds that a court cannot look to discriminatory motive behind a facially race-neutral act. Washington v. Davis, 426 U.S. 244, 96 S.Ct. 2040, 2050, n.11; Shakman v. Democratic Organization of Cook Cty., 481 F.Supp. 1315, 1338 (N.D.Ill. 1979). In Personnel Adm'r of Massachusetts v. Feeney, 442 U.S. 256, 99 S.Ct. 2282, 2296 (1979), the court stated:

> Discriminatory purpose ...implies that the decisionmaker ...selected ...a particular course of action at least in part "because of" ...its adverse effects upon an indentifiable group.

Continuation of excerpt from Brief:

"Where there is proof that a decision was motivated by a racially discriminatory purpose, the burden shifts to the decisionmaker to establish that the same decision would have resulted, even if the impermissible purpose had not been considered, Vil. of Arlington Hts. v. Metro Housing Dev., 429 U.S. 252, 97 S.Ct. 555, 566, n.21 (1977).

"The race conscious weighting and the deletion of some items and retention of others in the present case is comparable to racially motivated gerrymandering. Gomillion v. Lightfoot, 364 U.S. 339, 347 (1960); Cousins v. City Council of Chicago, 466 F.2d 830 (7th Cir. 1960).

Continuation of excerpt from Brief:

> Even though quantitative equality be preserved, members of a racial or ethnic group are protected ...from having ward lines drawn for the purpose of diluting or minimizing the voting power of such group.
>
> Cousins v. City of Chicago, 466 F.2d 830, 841 (7th Cir. 1960)."

* * *

Disposition of Court of Appeals

The Court of Appeals refused to consider the merits of the appeal, finding that the above-quoted argument was too short. The Court complained that the due process and equal protection theories were "complex". (App. 13a)

Nevertheless, petitioners did not present a due process claim on appeal, and stated in their Brief of Appellants, p.5, that they were "not appealing the

dismissal of their theory of a denial of due process". Further, petitioners did not present a "complex" equal protection claim. The Court apparently lost sight of the fact that these cases were before it only on the issue of striking of pleadings.

The question on appeal was purely a question of law, whether a pleader can allege that the equal protection clause protects against superficially neutral, but racially motivated misconduct. There was no evidence to analyze at this stage of the case.

The shortness of the argument was mandated by the rules of the Court of Appeals which direct litigants to avoid "a profusion of citations", where there is controlling precedent. The rules direct litigants to cite "a few good cases in point" and "show the court that

the case should be read" in either a "good quote" or "terse summary in a sentence or two..." "...all that is not necessary should be ruthlessly discarded..." Practioner's Handbook for Appeals to the United States Court of Appeals for the Seventh Circuit, 1991 Edition, pp.50-51.

The Court of Appeals found that petitioners failed to give the reasons for the District Court's ruling (App. 14a), apparently overlooking that petitioners did paraphrase the District Court's reasons, namely that the test adjustments were not a denial of equal protection because they "left everyone in same boat" (Brief of Appellants, p.14).

The Court of Appeals' found that petitioners failed to cite paragraphs of PETIT's proposed Second Amended Complaint (App. 11a-12a). Nonetheless,

petitioners did not claim that new facts in the proposed amended complaint were needed to support the aforegoing argument. The District Court's dismissal had not been based upon any deficiency in pleading the facts, rather, its dismissal was based purely on its interpretation of the equal protection clause.

Disposition of District Court

Judge Marshall had adopted, without adding any evaluation, the Magistrate's limited discussion of this issue (only about one page) (BigbyNR 435,pp. 16-17; USNR 1927, p.7; App. 18a, 30a, 37a).

The only case cited in the Magistrate's Report actually supports the petitioners' argument: New York City Transit Authority v. Beazer 440 U.S. 568, 587-88, 99 S.Ct.1355,1369 (1979). In Beazer, the Court held that

a transit authority's facially neutral policy of excluding heroine addicts from operating commuter trains did not have a racially discriminatory purpose. Although the plaintiffs in Beazer failed to prove an unlawful motive, the Court agreed with the principle that facially neutral conduct that is undertaken with a discriminatory motive can be a denial of equal protection.

(b)

VIOLATION OF A CHICAGO ORDINANCE AND RULES

(Pendant Count)

Introduction

The CITY code and rules, which are set forth in "Statutes Involved" on pages 3-5 of this Petition, mandate its officials to weight test components and to evaluate test results based upon "merit principles" (Personnel Rule VI, Sec.4), and not based upon a design for racial balance. The language is clearly mandatory, containing the word "shall", rather than "may". The purpose of the ordinance is "...to provide for a professional and progressive merit system for employment..."

Failure of Court of Appeals to Consider Argument

The Court of Appeals did not consider the following portion of the the Brief of Appellants on the pendant count under local law, quoted verbatim, which petitioners present as their argument on this point for this petition:

From Brief of Appellants, pp.11 -13, 21:

> "THE CITY OF CHICAGO IS REQUIRED TO COMPLY WITH PROVISIONS OF ITS OWN MUNICIPAL CODE AND PERSONNEL RULES THAT ARE BY THEIR TERMS MANDATORY.
>
> "The pertinent rules and ordinances, attached to the complaints as Exhibits A and B (BigbyNR 393,394/ USNR 1856). mandate that candidates for promotion shall be ranked in order of excellence and prohibit discrimination based upon race.

Continuation of excerpt from Brief:

The rules mandate that CITY employees have opportunity for employment without regard to race, that the weighting for the various parts of examinations be based on job-related factors as determined by analysis of duties and requirements for the position, and merit principles shall be used in determining the weighting of separate tests in an examination, in evaluating the results of examinations, and in determining the relative ratings or ranking of the competitors. The rules provide that candidates have the right to review their own test records.

"The Municipal Code and personnel rules governing promotions provide broader

Continuation of excerpt from Brief:

protection to the candidates than the Constitution. To fall under the protection of the rules, a test candidate does not have to show racial animus or disparate treatment because of their race.

"In her report finding that the CITY does not have to follow these rules and laws, which was adopted by Judge Marshall, the Magistrate invented oxymorons: 'discretionary rules' and 'discretionary laws'.

"To the contrary the Court of Appeals held that these local laws must be followed:

> ...state and local law should govern the selection and promotion of police officers...
> U.S. v. City of Chicago, 894 F.2d 943, 949 (7th Cir. 1990)

Continuation of excerpt from Brief:

"In a pending suit challenging detectives' promotions, United States District Court Judge George Lindberg ruled that the CITY is bound by its own personnel rules and ordinances, Majeske v. City of Chicago, [unpublished opinion was cited here; the opinion is published at 740 F.Supp. 1350, 1355 (N.D. Ill. 1990)].

"It is fundamental that a public body has a duty to follow its own rules, and its employees have the right to rely on those rules, Bell v.Civil Service Com'n, 161 Ill.App.3d 644,515 N.E.2d 248 (1987); Felle v.Metropolitan Sanitary Dist., 520 N.E.2d 1012 (1988).

Continuation of excerpt from Brief:

" A state official cannot violate his own regulations with impunity, Farmer v. McClure, 172 Ill.App.3d 246, 526 N.E.2d 486 (1988), Fernandez v. Margolis, 558 N.E.2d 699, 701 (1990).

"A police board cannot arbitrarily formulate test scores, Hoffman v. Bd. of Fire and Police Com'rs, 529 N.E.2d 790 (1988)

"In Sullivan v. Board of Fire and Police Com'rs, 103 Ill.App.3d 167, 430 N.E.2d 636 (1981), the court indicated that although the plaintiff did not have a property right to a job-related test, he would have a cause of action under state law to assert that a police board did not follow its own

Continuation of excerpt from Brief:

requirements to have a merit-based test:

> ...an applicant, such as plaintiff, ...has the standing to assert in an appropriate case that the procedure created by statute has not been followed... Sullivan v. Board of Fire and Police Com'rs, 103 Ill.App.3d 167, 430 N.E.2d 636 (1981).

"The District Court also dismissed allegations that the ordinances and personnel rules form a contract between the CITY and its employees.

"The cases of Duldulao v. Saint Mary of Nazareth Hosp., 115 Ill.2d 482, 505 N.E.2d 314 (1987) and Muellner v. Mars, Inc., 714 F.Supp. 351, 360-361 (N.D.Ill. 1989) support ERWIN and PETIT's right to bring a claim for breach

Continuation of excerpt from Brief:

of contract based upon the ordinances and rules.

"The cases cited by Magistrate Bucklo in her report on the pendant counts are inapposite. * (footnote at end)

"Footnote

"* In Levitt v. Gorris, 167 Ill.App.3d 88 (1988), cited by Magistrate Bucklo, the plaintiff conceded that the defendants violated no provision of local law when they discharged plaintiff, a probationary police officer, without a hearing or notice of charges. The Municipal Code in that case did not provide probationary police officers the right to a hearing and notice of charges.

"In United States v. City of Chicago (Earth, intervening appellee), 869 F.2d 1033 (7th Cir. 1989) cert. denied 58 U.S.L.W. 3217 (1989), cited by Magistrate Bucklo,, the Court of Appeals supported the CITY's decision to correct its 1979 sergeants' roster and promote in rank order after it discovered an error in an officer's performance rating that affected his position on the list.

Continuation of excerpt from Brief:

> "Magistrate Bucklo distinguished Duldulao by making a novel finding that personnel rules for public employees can never create contractual rights, since the rules are also legislative acts. The cases cited by the Magistrate to support her finding are inapplicable, since they deal with the terms or tenure of public employees, and not with rules setting criteria for a promotional test which were in force at the time the test was given: Levitt v. Gorris, 167 Ill.App.3d 88 (1988) concerns a municipalities' right to discharge a probationary police officer at will; Dodge v. Board of Education of Chicago, 302 U.S. 74, 78-79 (1937) affirms a states court's right to rule on the legality of a decision to reduce a retirement annuity through subsequent legislation."

* * *

Additional authority provided

After their Brief was filed which contained the above-quoted excerpt, petitioners filed citations to new Illinois cases with the Court of Appeals, which further supported their point that state and local codes and

rules governing police promotion tests are binding and enforceable: Kren v. Civil Service Comm. of Springfield, 574 N.E.2d 1289 (4th Dist. 1991), and Peoria Police Sergeants v. City of Peoria Bd. of Fire & Police Comm., 574 N.E.2d 1240 (3rd Dist. 1991). (Unlike Springfield and Peoria, Chicago is a home rule unit and is governed by its own ordinance rather than the state statute).

Disposition of the Court of Appeals and District Court

In its unsigned Order (App. 3a), the Court of Appeals failed to discuss the pendant count alleged under the CITY's code and rules.

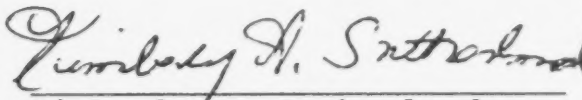
In their Brief for the Court of Appeals, petitioners had paraphrased the District Court's reasons for dismissing the pendent count, namely that the Court considered the local laws to be

discretionary. Petitioners distinguished the cases cited by the District Court. Petitioners did not claim that new material in PETIT's Second Amended Complaint was intended to cure supposed defects in this count. The District Court had not based its dismissal on any deficiency in pleading the facts. (BigbyNR 435, pp. 31-32; USNR 1927, pp.11-12; App., 33a-35a,40a.)

C O N C L U S I O N

For the aforegoing reasons, petitioners pray that this Court grant a writ of certiorari, and reverse the Court of Appeals order of December 13, 1991, which affirmed the dismissal of allegations of PETIT's and ERWIN's First Amended Intervenors' Complaints. These allegations challenged racially motivated manipulations of Chicago police promotion tests. [PETIT Count I, par. 19f(2) and Count II; ERWIN Count I, pars. 24A,24C,391 and 39m and Count II]

Respectfully submitted,



Kimberly A. Sutherland
Counsel for ANN ERWIN, ROBERT PETIT
and other petitioners
Counsel of record
180 W. Washington St., Suite 700
Chicago, IL 60602
(312) 726-0045

FOOTNOTES

1. List of parties:

ERWIN petitioners:

ANN ERWIN, LINDA L. NELSON, PATRICIA A. RIEGLER, ROSEANN FITZGERALD, DONNA PACANOWSKI, ANN M. SHAW, ROBERTA M. WIELGUS, MARY J. JONES, MARSHA S. FELDMAN, SYLVIA QUINN, JOAN BIEBEL, FRANK CAPPITELLI, DENNIS G. HAYES, ERNEST EVANS, JUANITA JOHNSON, JOSEPH de la PAZ, RAUL FLORES, ANGELO DEL MARCO, BRIAN LENDZION, ROBERT MICHAEL MALONEY, ROBERT C. THORNE, and KENNITH RESTIS, DARIO NOMELLINI, ROBERT LOMBARDO, MARY ELLEN O'CONNOR

PETIT petitioners:

ROBERT PETIT, ROBERT SIWEK, GEORGE BOWNESS, MICHAEL DUNNE, PATRICIA STUBE DANIEL BURKE, MARK DONAHUE, SHEILA MAGNUS, BERNARD MALLOY, MARIO RAMIREZ, MAJA WIESINGER, MILTON SNEED, AMY BAGANS, MARY ANN JANKOWSKI, KENNETH KRUPOWICZ, FRANK KRUPA, MARY SIWAK, WILLIAM WOITOWICH, STEPHEN VRTIS, JAMES HOGAN, FREDERICK TOMASEK, JOHN APEL, MICHAEL STEPHENS, FRANK, VUKONVICH, CHARLES M. SMITH, JOHN BRYA, MICHAEL CONLEY, BRANDON MEDOW, CORNELIUS SPENCER, RICHARD WASOWSKI, JABULANI SPRAGGINS, DANIEL DIXON, JOSEPH SIGNORETTI, LORELEI DAVIS, WILLIAM B. DAVIS, DONALD BARRY, GARRY KRIEGER, BOHDAN, OLIJNYK, WAYNE JOHNSON, CHESTER BACH, EUGENE CHUDY, JAMES LUPI, CATHERINE MORRISON, DOROTHY JOYCE, MARSHALL MASSEY, JAMES CAVANAUGH, DANIEL

CUNNINGHAM, ANDREW MARKULIS, DOROTHY LUBE, PHILLIP GRAZIANO, WILLIAM BARRON, RICHARD CAUBLE, WILLIAM BALDREE, JAMES ZURAWIK, JOSEPH MARAFFINO, JOHN M. MURRAY JOYCE WRIGHT, ALBERT GRAF, DONNA YOUNG, JOHN TOLOMEO, HAROLD MATUSZAK, JAMES DUCKHORN, DAVID MARCH, DONALD PETERSON, EDWIN BUDZ, EDWARD SWIDERSKI, WILLIAM HINTON, ROBERT KLICH, WAYNE CARLSON, GREGORY GEISBUSH, THOMAS KRUPOWICZ, DONALD O'NEILL, YOLANDA BOND, KENNETH BURKE, STEPHEN GAWRYS, LINDA DEAN, ROBERT ORLANDO, ROBERT SWIDERSKI, BRUNO GAWEL, JAMES CUMMINGS, PAUL PRASKI, JAMES MATHEY, PEGGY JO SCHULTE, LEN WASHINGTON, WILLIAM (MIKE) VOIGHT, RICHARD KING, GUIDO COLONNA, BERNARD PISTELLO, JOHN HAYES, JOHN BAIO, JOSEPH KELLY, MARIE TALKOWSKI, TIMOTHY LYNN, JOHN HERMANN, KEVIN DUFFIN, KENNETH McMASTER, HARRY COLLINS, DENNIS DeGREGORIO, JOHN STELLA, JAMES SWEENEY, PATRICK McCARTNY, ROBERT HACKER, JAMES MALONEY, MARY JO MILAM, JOHN HUSSEY, DAN McINERNEY, JAMES GOGA, JOHN DEHEER, THOMAS FALLON, GERALDINF HINMAN, DENNIS MADERAK, WILLIAM MAROSE, MILAN HREBENAK, BRUNO MUSZYNSKI, ALANE STOFFEEREGEN, DENNIS FITZGERALD, JOSEPH PEDERSEN, KENNETH LAZZARA, ANNETTE BUDAY, MAICHAEL COLLINS, WILLIAM GRIEB, THOMAS MARCIAL, RICHARD ELMER, ROBER FRAZIN, TONY JIN, KAREN SAVI, DAVID MERRIAM, SANDRA ENGEMANN, ANGELO FALBO, DENNIS SHAW, JOHN NIELSON, WILLIAM JACKSON, HENRY ADEMA

Respondents:

CITY OF CHICAGO, JESSE HOSKINS, OCTAVIO MATEO, LEROY MARTIN, FRED RICE

Names of Bigby plaintiffs:

(The named Bigby plaintiffs did not take either of the tests at issue in these cases. Petitioners have not sued the named Bigby plaintiffs, however, petitioners have sued their attorneys, Kenneth Flaxman and Stephen Seliger, as co-conspirators with the CITY, in the fresh complaints described in Footnote #4, p.48. Flaxman's and Seliger's motion to dismiss the conspiracy allegations was denied.)

WILLIAM BIGBY, CURTIS BONDS, MAURICE BROWN, JAMES CRAIG, NOLON HAWKINS, ALBERT HENRY, CECIL HOCKETT, HUBERT HOLTON, EARL MCGHEE, DANIEL GIBSON, LAMORE THREAT, JULIUS YOUNG, EUREL JACKSON, ROOSEVELT LOWE, THRUSTON McCLENDON, LEROY O'SHIELD, WILLIAM THOMPSON, WILLIE WILLIAMS, WILLIAM SHAW, HOSEA CROSSLEY and ELMER LEWIS

2. Over the last 20 years, the racial preferences were undertaken by the CITY sometimes voluntarily and sometimes by court order. A list of citations to United States v. City of Chicago in the Table of Authorities in this petition documents the history of court-ordered preferences.

3. Petitioners cite the record in Bigby v. City (Erwin intervenors) as "BigbyNR".

4. Petitioners cite the record in U.S. v. City (Petit intervenors) as "USNR".

5. Judge Marshall voluntarily dismissed without prejudice the allegations of petitioners' complaints challenging certain overt racial manipulations, including racially altered scores and superimposed quotas. Petitioners are proceeding with these allegations in the district court in fresh cases, consolidated under court number 91 C 668, before District Court Judge Paul Plunkett, Northern District of Illinois. There are now 344 plaintiffs challenging the sergeants' test and 230 challenging the lieutenants' test.

6. The affidavit of petitioners' attorney verifying the accuracy of the excerpt of the oral argument is in the Appendix (42a).

APPENDIX

A P P E N D I X

T A B L E O F C O N T E N T S

(in reverse chronological order)

Page

February 4, 1992 - Order of United States Court of Appeals denying petition for rehearing..... 1a

December 13, 1991 - Order of United States Court of Appeals affirming District Court's dismissal order of October 26, 1990..... 3a

October 26, 1990 - U.S. District Court Judge Marshall's consolidated Final Memorandum Order adopting Magistrate's reports recommending dismissal of ERWIN /PETIT complaints in part (BigbyNR 527/ USNR 2077).....18a

December 12, 1989 - Magistrate's report recommending dismissal of ERWIN complaint in part (BigbyNR 435).....30a

December 12, 1989 - Magistrate's report recommending dismissal of PETIT complaint in part (USNR 1927) 37a

Attorney's Affidavit as to accuracy of transcription of oral argument 42a

Nos. 90-3506, 3507 & 3619

United States Court of Appeals for the Seventh Circuit

United States, Plaintiff, and ANN ERWIN, et al., intervenors-appellants, v. CITY OF CHICAGO, defendants- appellees

---

William Bigby et al., Plaintiffs, and ROBERT PETIT et al., intervenors-appellants v. CITY OF CHICAGO, defendants- appellees

Before Hon. John Coffey, Hon. Frank H. Easterbrook and Hon. Thomas E. Fairchild (the Order is unsigned)

February 4, 1992

ORDER

On consideration of the petition for rehearing and suggestion for rehearing en banc filed by counsel for the Intervening Plaintiffs-Appellants in the above-entitled cause, no judge in regular active service having requested a vote thereon, and all judges of the original panel having voted to DENY the petition for rehearing with suggestion for rehearing en banc,

IT IS ORDERED that the aforesaid petition for rehearing with suggestion for rehearing en banc be, and the same is hereby DENIED.

Nos. 90-3506, 3507 & 3619

United States Court of Appeals for the Seventh Circuit

United States, Plaintiff, and ANN ERWIN, et al., intervenors-appellants, v. CITY OF CHICAGO, defendants- appellees

---

William Bigby et al., Plaintiffs, and ROBERT PETIT et al., intervenors-appellants v. CITY OF CHICAGO, defendants- appellees

Before Hon. John Coffey, Hon. Frank H. Easterbrook and Hon. Thomas E. Fairchild (the Order is unsigned)

December 13, 1991

ORDER

In 1973, the United States filed a complaint against the City of Chicago alleging race and sex discrimination in the hiring and promotion of police officers. Judge Marshall, Northern District of Illinois, held that the City was knowingly discriminating against blacks, hispanics, and women and ordered the City to hire and promote a certain percentage of disadvantaged persons. United States v. City of Chicago, 411 F. Supp. 218 (N.D. Ill. 1976), aff'd in part, 549 F.2d 415 (7th Cir. 1977). A second complaint was filed against the City of Chicago in 1980 by a group of black police sergeants, including William Bigby. The sergeants challenged the police department's promotional test as a violation of Title VII. Judge Marshall held that the test violated Title VII and ordered that the City,

with his supervision, develop a fair test. Bigby v. City of Chicago, No. 80 C 5246 (N.D. Ill. 1984). On March 14, 1988, Judge Marshall approved a list of eligible candidates for promotion to lieutenant based upon results of a newly developed promotional test. Bigby v. City of Chicago, No.80 C 5246,1988 U.S. Dist.LEXIS 2257 (N.D.Ill.March 14,1988).

Ann Erwin and a number of other police officers subsequently intervened in Bigby v. Chicago. Likewise, a group of police officers, including Robert Petit, intervened in United States v. Chicago. The intervenors in both cases challenged the use of the eligibility list as a violation of the equal protection and due process clauses of the Fourteenth Amendment and 42 U.S.C. Sec. 1981, 1985(3) and 1986. The intervenors also alleged a state law

claim for breach of a contractual obligation created by the City's personnel rules and regulations.

The City filed motions, in both United States v. Chicago and Bigby v. Chicago, to dismiss the intervenors' complaints for failure to state a claim upon which relief could be granted under Fed. R. Civ. P. 12(b)(6). The district court granted the motion to dismiss as to all equal protection claims, except those related to the statistical standardization of test scores by race. The court found that the other equal protection claims alleged only actions that applied equally to all candidates regardless of race and, thus, did not allege a discriminatory effect. The district court dismissed the intervenors' procedural and substantive due process claims because it found the

intervenors had no property or liberty interest in a particular spot on the promotion list, promotion to a particular rank, or a fair test. The district court dismissed the Section 1981 claim as not actionable, pursuant to Patterson v. McLean Credit Union, 491 U.S. 164 (1989). The court found that the denied promotions, alleged in the complaint, would not have constituted new and distinct relationships between the officers and the City if granted. The court also granted the motion to dismiss the intervenors' state contract claims on the grounds that Illinois law did not create a contractual right to a particular promotional test. As to Sections 1985(3) and 1986 claims, the district court found that the Petit intervenors had alleged a conspiracy but that the Erwin intervenors had not, and

thus, the court dismissed the Section 1985(3) and derivative Section 1986 claims only as to the Erwin intervenors.

Discovery proceeded on the remaining claims and a trial date of November 5, 1990 was set for both cases. Judge Easterbrook has suggested that there should be a fresh start at this litigation rather than continual intervening complaints. U.S. v. City of Chicago, 894 F.2d 943, 949 (7th Cir. 1990) (Easterbrook, J., concurring). Pursuant to that suggestion, the intervenors filed new civil actions which were assigned to other district judges, and they moved in this case for dismissal without prejudice of their entire complaints pursuant to Fed. R. Civ. P. 41(a)(2). As to claims previously dismissed under Rule 12(b)(6), Judge Marshall held that it

would be an abuse of discretion to dismiss previously adjudicated claims without prejudice and dismissed them with prejudice. Judge Marshall granted the motion for voluntary dismissal without prejudice as to the remaining claims of the complaints. Bigby v. City of Chicago, 752 F. Supp. 252 (N.D. Ill. 1990). The Erwin and Petit intervenors now appeal.

DISCUSSION

The intervenors moved to disqualify the plaintiffs' attorneys, Kenneth Flaxman and Stephen Seliger. In the district court, the intervenors argued that Flaxman and Seliger did not represent parties with any interest in the present litigation, that Flaxman and Seliger would be witnesses in the case, and that they had a conflict of interest. The district court denied the

motion. Bigby v. City of Chicago, No. 80 C 5246 (Bucklo, Mag. Sept. 11, 1990). The intervenors renew their motion in this court based upon the argument that Flaxman and Seliger do not represent parties with any interest in the litigation. Judge Marshall allowed the original litigation to proceed as a class action on behalf of a plaintiff class certified by the district court. The plaintiff class includes all black sergeants who applied for promotion to lieutenant in 1977 were adversely affected by the City's promotional process. Bigby v. City of Chicago, Marshall, J., May 15, 1981. Flaxman and Seliger have represented the plaintiff class throughout this litigation. The original litigation resulted in a holding that the City's promotional test violated Title VII. As a remedy for

that violation, Judge Marshall ordered that the City develop a fair test. The eligibility list, which the intervenors now challenge, was the product of Judge Marshall's order in the original litigation. The plaintiff class, represented by Flaxman and Seliger, surely have an interest in the validity of a remedy ordered on their behalf. As Magistrate Bucklo found, if the intervenors succeed, the plaintiff class "may lose promotions they have already been granted" based upon the eligibility list or "be placed lower on the promotion list than they are currently places." We find that the district court properly denied the intervenors' motion for disqualification of plaintiffs' attorneys.

The Petit intervenors also argue that the district court should have

granted their motion to file a second amended complaint. Their brief says only that "[t]he new complaint contains allegations based upon documents produced in discovery." There is no explanation of how the new material would affect the claims dismissed with prejudice now on appeal.

The City argues that the intervenors cannot challenge the dismissal of their claims with prejudice because the intervenors voluntarily agreed to the dismissal with prejudice in return for dismissal of all claims. The intervenors, however, originally moved for dismissal of all claims without prejudice. The City asserts that at the hearing the intervenors consented to dismissal with prejudice of their claims earlier dismissed on motion. The record does not clearly

show such consent. Therefore, we must treat the dismissal with prejudice as an involuntary adverse judgment based on the merits of those claims. The issue on this appeal would then be whether the earlier dismissals for failure to state a claim were erroneous.

We find it impossible to address that issue because of the inadequacies of the Appellants' brief. The Appellants' attorney has failed to make an adequate presentation of the issues.

The Appellants' brief mentioned six issues, some of a complex, constitutional nature, devoting only eleven pages to all six issues. Complex issues of equal protection and due process were given only cursory treatment. For example, the Appellants' brief included only one and a half pages of argument on their complex equal

protection claims and one-half of a page on the dismissal of their Section 1981 claims pursuant to Patterson.

The brief description we have given of the district court's reasons for dismissal of the intervenors' claim is our own. Appellants' briefs did not provide it, let alone demonstrate why the reasons were in error.

Overall, the Appellants' argument was sketchy and some sections were almost completely incomprehensible. The brief mentions several decisions as authority for different propositions but does not explain how those decisions apply to the facts of this case. Ideas are briefly thrown out to the reader with no argument developed in support of those ideas. The brief seems to be simply suggesting possible arguments for the Appellants' position rather than

actually making those arguments.

Appellants' appendix, bound with the brief totalled 134 pages. The judgments appealed from and the district court opinion accounted for 21 pages. These were the documents required to be bound with the main brief, Circuit Rule 30(a). Because additional contents pursuant to Circuit Rule 30(b) brought the total pages above 50, they should have been bound separately. More importantly, there were 13 separate items in the appendix, ranging in size from 1 to 37 pages. There were no marginal tabs indicating where the separate items could be found and the appendix was not paginated sequentially, so that particular items and particular pages within them could be readily located while reading the briefs or at oral argument.

Rule 28(a)(4), Fed. R. App. P., requires that the argument section of a brief to this court "contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on." This court has long held that it is the duty of the attorneys "to examine carefully the law and apply it in a cogent fashion to the facts of the case." Smith v. Town of Eaton, Inc., 910 F.2d 1469, 1470 (7th Cir. 1990), cert. denied, ___ U.S. _____, 111 S. Ct. 1587, 113 L. Ed. 2d 651 (1991). This court is not obligated to research and construct possible arguments for the parties, particularly when the parties are represented by counsel. John v. Barron, 897 F.2d 1387, 1393 (7th Cir. 1990), cert. denied, ____

U.S. ____, 111 S. Ct. 69, 112 L. Ed. 2d 43 (1990). The inadequacies of the Appellants' brief have, essentially, deprived us of an adversarial presentation of the issues. A decision based upon inadequate argument inherently has increased danger of error which this court must avoid. Bonds v. Coca-Cola Co., 806 F.2d 1324, 1329 (7th Cir. 1986). Based upon the woeful inadequacy of Appellants' argument in this case, we find it impossible to make any determination whether there was error in the district court's judgment.

The judgment of the district court is AFFIRMED.

United States District Court for the
Northern District of Illinois
Eastern Division

United States v. City of Chicago, 73 C 2080 / Bigby v. City of Chicago 80 C 5246

Prentice H. Marshall, District Judge

October 26, 1990

FINAL MEMORANDUM ORDER

In United States v. City of Chicago, 870 F.2d 1256 (7th Cir. 1989), Ann Erwin and her colleagues persuaded the Court of Appeals for this circuit that I erred when I denied their motion to intervene in Bigby v. City of Chicago, 80 C 5246. They sought to challenge the standardization of scores on the 1987 lieutenants' examination which had a disparate impact on the black sergeants who took the examination. On remand I permitted Erwin, et al. to intervene in the Bigby case.

Thereafter, I permitted Robert Petit, et al. to intervene in United States v. City of Chicago, 73 C 2080 for the purpose of challenging the standardization of scores on the 1987 sergeants' examination which had a disparate impact on black males and all females who took the examination. The Petit intervenors are represented by the same lawyer who represents the Erwin intervenors.

On December 12, 1989, Magistrate Elaine E. Bucklo filed comprehensive reports and recommendations in 73 C 2080 and 80 C 5246 regarding motions to strike and dismiss certain of the allegations of the Petit and Erwin complaints. I approved those reports and recommendations in their entirety and dismissed certain of the intervenors' claims and ordered others

to be answered by defendants. Those were not final orders. Rule 54(b),F.R.C.

In July of this year the City of Chicago advised the court and the parties that it was undertaking "voluntary affirmative action" with respect to promotions to the ranks of sergeant and lieutenant. The precise dimensions of the voluntary affirmative action were not spelled out in the notice. The city merely stated that it "planned to make promotions at each rank, including sergeant and lieutenant, at proportions for minorities and women at a level of twenty percent above the composition of those groups in the relevant lower ranks, with two exceptions." Notice to Court, filed July 16, 1990.

The standardization of the test scores for promotion to sergeant and

lieutenant provoked some fresh (i.e., non-intervenor) litigation. Henry F. Gralak, et al. v. City of Chicago, et al., 89 C 6247 (originally assigned to Judge Plunkett); Ann Erwin, et al. v. City of Chicago, et al., 90 C 950 (originally assigned to Judge Rovner but transferred to Judge Williams). The voluntary affirmative action undertaken by the city has provoked more fresh litigation. Robert Petit, et al. v. City of Chicago, et al., 90 C 4984 (assigned to Judge Hart); Fraternal Order of Police, Lodge 7 v. Richard M. Daley, Mayor, etc., et al., 90 C 5203 (assigned to Judge Nordberg). The fresh Erwin and Petit cases have been brought by the same lawyer who represents them as intervenors in these actions.

In addition, counsel for Erwin moved to join Kenneth Flaxman and

Stephen Seliger as defendants in the Bigby case (80 C 5246) alleging that they, as counsel for Bigby, et al., conspired with the City to standardize unlawfully the lieutenant test scores. I denied the motion. Undaunted, counsel joined Flaxman and Seliger in 90 C 950.

In United States v. City of Chicago, 870 F.2d 1256, 1259, the court, while ordering that Erwin, et al. be permitted to intervene in the Bigby case, observed that I am not an ombudsman of the Chicago Police Department and that this litigation strikes a "parallel to the interminable equity proceedings mocked in Dickens' novel Bleak House." See also United States v. City of Chicago (appeal of the Fraternal Order of Police) 894 F.2d 943, 948 (7th Cir. 1990) (Easterbrook, J. concurring) tracing the political

history of the presidency of the United States and the mayoralty of the City of Chicago during the course of this litigation.)

Defendants requested me to accept reassignment of the fresh cases (involving standardization of scores and voluntary affirmative action) as related to 73 C 2080 and 80 C 5246. In light of the admonitions of the Court of Appeals I declined to do so.

Intervenors Petit, et al. and Erwin, et al. disagree with the orders approving the recommendations of Magistrate Bucklo and dismissing many of the allegations of their complaints. Thus, althougn their counsel persuaded the Court of Appeals that they were entitled to intervene in these actions, on August 16, 1990 the Petit and Erwin intervenors moved to dismiss their

intervening complaints without prejudice pursuant to Rule 41(a)(2) of the Federal Rules of Civil Procedure, so that they could refile them before different judges as amendments in their fresh complaints. The Bigby plaintiffs and the City objected to the motions; the United States did not oppose them. When the motions were first presented I denied them.

But I have reflected. I will not entertain the fresh complaints challenging the standardization of test scores and the voluntary affirmative action undertaken by the City. Consequently, all of the present controversies will not be resolved in the actions before me. Furthermore, Messrs. Flaxman and Seliger are not defendants before me, although they are in one of the fresh actions. So that

controversy will not be resolved here. Consequently, on my own motion I announced I would reconsider the motions of the Petit and Erwin intervenors to dismiss voluntarily their complaints. They then filed a supplement to their motions.

The matter was heard in open court. Counsel for the Petit and Erwin intervenors urged that I dismiss the totality of both intervening complaints without prejudice. I stated unequivocally that I would not do that; that only the allegations which had survived the earlier motions to dismiss would be dismissed without prejudice. Counsel for intervenors made clear her understanding of that, and persisted in the Rule 41(a)(2) motions.

Recently the Court of Appeals for this circuit in Villegas v. Princeton

Farms, Inc., 893 F.2d 919 held that it is an abuse of discretion for a district court to permit a voluntary dismissal under Rule 41(a)(2) with regard to claims which have been adjudicated. But, in my judgment, it is not an abuse of discretion if I permit the intervening plaintiffs to dismiss without prejudice claims which survived the motions to dismiss.

The decrees in these two cases have served their purposes. The quarterly report of the Chicago Police Department filed October 5, 1990 shows a police department of males and females, blacks, caucasians, and hispanics. There have been no complaints of gender, race or ethnic discrimination in entry level hiring since 1975. While there are pending complaints of discrimination in promotions to sergeant and lieutenant

they are essentially those of white officers alleging that blacks and hispanics are now receiving favored treatment. Today's controversies are 180 degrees from those of 1973.

Accordingly, in United States v. City of Chicago, 73 C 2080, a final judgment will be entered dismissing without prejudice the claim of plaintiff-intervenors Robert Petit, et al. challenging, under the equal protection clause of the fourteenth amendment to the Constitution of the United States, the statistical standardization of scores on the 1987 sergeant promotion test and dismissing with prejudice those claims of plaintiff-intervenors Robert Petit, et al. contained in paragraphs 19-f, 20, 23, of the intervenors' first amended complaint and those claims based upon

the due process clause of the fourteenth amendment to the Constitution of the United States and those claims under 42 U.S.C. Secs. 1981, 1985(3) and 1986 and the pendent state law claim contained in Count II of the intervenors' first amended complaint.

In Bigby v. City of Chicago, et al., No. 80 C 5246 a final judgment will be entered dismissing without prejudice the claims of plaintiff-intervenors Ann Erwin, et al. challenging under the equal protection clause of the fourteenth amendment to the Constitution of the United States the statistical standardization of scores on the 1987 lieutenant promotion test and the claims made under 42 U.S.C. Secs. 1985(3) and 1986, and dismissing with prejudice all of the paragraphs of Count I of the first amended complaint except

paragraphs 1 through 23, 24-B and 30-38 and all of the claims of plaintiff intervenors Ann Erwin, et al. made under the due process clause of the fourteenth amendment to the Constitution of the United States and under 42 U.S.C. Sec. 1981 and the pendent state law claim contained in Count II of the intervenors' first amended complaint and their claim for punitive damages.

The motion of intervenor-plaintiffs Robert Petit, et al. for leave to file a second amended complaint in 73 C 2080 is denied.

United States District Court
Northern District of Illinois
Eastern Division

BIGBY v. CITY OF CHICAGO (ERWIN intervenors)
No. 80 C 5246

Elaine E. Bucklo, United States Magistrate

December 12, 1989 - Excerpt of Magistrate's report recommending dismissal of ERWIN complaint in part (lieutenants' test)

REPORT AND RECOMMENDATION

(pp. 16-17:

Equal Protection

The plaintiffs' first allegation is that by manipulating the 1987-88 lieutenants' test results on the basis or race to favor black and hispanic candidates, the City violated their right to equal protection of the law as guaranteed by the Fourteenth Amendment.

The City argues that decisions regarding test design and scoring which were applied equally to candidates of

all races do not state a claim for violation of the equal protection clause. The Supreme Court stated that:

> "[t]he [Equal Protection] Clause announces a fundamental principle: the State must govern impartially. General rules that apply evenhandedly to all persons within the jurisdiction unquestionably comply with this principle. Only when a governmental unit adopts a rule that has a special impact on less than all the persons subject to its jurisdiction does the question whether this principle is violated arise."

New York City Transit Authority v. Beazer, 440 U.S. 568, 587-88, 59 L.Ed.2d 587, 604 (1979).

Here, as the City points out, numerous acts allegedly taken by the City applied to all persons taking the 1987-88 lieutenants' test, regardless of race. These include use of multiple choice questions as a screening device (Complaint Par. 22.A.); giving 80% weight to the oral portion and 20% weight to the written short answer

portion of the test (Par. 22.C.); and the general design and scoring of the test, including its use of allegedly wrong answers for three questions (Pars. 23, 25, 26, 27, 36). All candidates that took the 1987-88 test faced the same obstacles in regard to these allegations. There is no allegation that the candidates of different races, for example, were screened by different multiple choice tests, or that candidates' tests were weighted differently according to race. Since these decisions applied across-the-board to all candidates, they cannot be the basis for an equal protection claim, and I recommend that these paragraphs be stricken.

(pp. 31-32:)

State Law

In Count II, plaintiffs allege that the City's personnel rules and regulations create a contractual obligation under Illinois law to administer legitimate promotional tests. They allege that the actions the City us alleged to have taken in Count I breached its contract obligations toward the plaintiffs.

The Illinois Supreme Court has held that:

> "an employee handbook or other policy statement creates enforceable contractual rights if the traditional requirements for contract formation are present. First, the language of the policy statement must contain a promise clear enough that an employee would reasonably believe that an offer has been made. Second, the statement must be disseminated to the employee in such a manner that the employee is aware of its contents and reasonably believes it to be an offer. Third, the

> employee must accept the offer by commencing or continuing to work after learning of the policy statement."

Duldulao v. St. Mary of Nazareth Hospital Center, 115 Ill.2d 482, 490, 106 Ill.Dec. 8, 12, 505 N.E.2d 314, 318 (1987).

In this case, the personnel rules and regulations alleged by plaintiffs to create contract rights are actually directions to the Commissioner of Personnel that set guidelines for the use of promotional exams. See, e.g., Rule 6 Section 4 (the determination of appropriate written, oral and performance tests, of methods of evaluating experience and training, and or weights to be assigned to various parts of an examination shall be made by the Commissioner of Personnel, and the commissioner shall establish the minimum requirements or passing score for all examinations or parts thereof). They

are not promises directed to the plaintiffs, and neither is the language of the regulations clear enough that the plaintiffs could reasonably believe the regulations to be an offer. See Levitt v. Gorris, 167 Ill.App.3d 88, 520 N.E.2d 1169, 1171, 117 Ill.Dec. 818, 820 (1st Dist. 1988) (police and fire board rules were not an employer's voluntary promise within the meaning of Duldulao). Moreover, legislative acts fixing the terms of employment do not create private contract rights. Id. Since the plaintiffs have no contractual right to a particular promotional examination under Illinois law, I recommend that Count II be dismissed.

(p.35:)

Conclusion

...Because all allegations of Count I denoted "Violation of Equal Protection" fail to state a claim on which relief can be granted, except those regarding alleged statistical standardization of test scores, I recommend that all paragraphs of Count I of the First Amended Intervenors' Complaint, No. 80 C 5246, except paragraphs 1-23, 24.B, and 30-38. be striken....I also recommend that Count II be dismissed...

United States District Court
Northern District of Illinois
Eastern Division

USA v. CITY OF CHICAGO (PETIT intervenors)
73 C 2080

Elaine E. Bucklo, United States Magistrate

December 12, 1989 - Excerpt of Magistrate's report recommending dismissal of PETIT complaint in part (sergeants' test)

REPORT AND RECOMMENDATION

(pp. 7-8:)

Equal Protection

The plaintiffs first contend that by manipulating the raw scores of the 1985-88 sergeants' test on the basis of race, the City violated their right to equal protection of the law as guaranteed by the Fourteenth Amendment.

However, as I found in regard to similar allegations regarding the 1987-88 police lieutenants' promotion test, actions taken by the City that applied to all candidates regardless of race do not state a claim under the equal protection clause. Erwin v. City of Chicago, No. 88 C 6927, Report and Recommendation at 17-19 (Dec. 12, 1989) (Bucklo, Mag.). For the same reasons, allegations in this complaint that the City selected a scoring method that bunched scores into a narrow range (Complaint par. 19.f.1)); eliminated 30 questions from the multiple choice portion of the examination (Complaint par. 19.f.2)); failed to give candidates information regarding their raw scores and the scoring methods for the test, failed to make a record of all parts of the test, and failed to permit

candidates to review their exams, Complaint pars. 20.a.-g., fail to state a claim, and I recommend that these paragraphs be stricken.

The only allegations regarding violation of the equal protection clause that remain are those which relate to the City's statistical standardization of test scores by race. Based on the same reasoning by which I concluded that similar allegations regarding the 1987-88 lieutenants' exam stated a claim under the equal protection clause, Erwin Report and Recommendation, supra at pp. 19-24, I recommend that the City's motion to dismiss be denied with respect to allegations that the City improperly manipulated the sergeants' test scores on the basis of race.

(pp. 11-12:)

State Law

In Count II, plaintiffs allege that the City's personnel rules and regulations create a contractual obligation under Illinois law to administer legitimate promotional tests. They allege that the actions the City is alleged to have taken in Count I breached its contract obligations towards plaintiffs. I disagree. For the reasons stated regarding virtually identical allegations in the Erwin, Bigby and Cappitelli complaints, see Erwin Report and Recommendation at 32-34, the plaintiffs have no contractual right to a particular promotional examination under Illinois law, and I recommend the Count II be dismissed.

(p. 12:)

Conclusion

I recommend that the CITY's motion to dismiss the plaintiffs' equal protection claim be granted as to allegations of conduct that affected candidates of all races, and I recommend that paragraphs 19.f and 20 of the equal protection claim be striken....I recommend that the CITY's motion to dismiss and their pendant state law claim found in Count II be granted....

A F F I D A V I T

Now comes Kimberly A. Sutherland, being duly sworn on oath, and states:

1. I am an attorney licensed to practice law in the State of Illinois, Federal District Court for the Northern District of Illinois, the Federal Court of Appeals for the Seventh Circuit, and the United States Supreme Court, and I represent the ERWIN and PETIT petitioners in this cause.

2. On September 19, 1991, oral argument was heard in this cause before the Court of Appeals for the Seventh Circuit. According to regular practice, the Clerk of the Court made an audio-tape of the oral argument; a court reporter was not present.

3. I purchased a copy of the audio-tape of the oral argument from the Clerk of the Court of Appeals for the Seventh Circuit.

4. The excerpt of the oral argument contained on page 20 of this petition was transcribed by me from the audio-tape and is true and accurate transcription of the tape.

Kimberly A. Sutherland

Subscribed and Sworn to before me this 9th day of April, 1992.

Notary Public

42a

OFFICIAL SEAL
PATRICIA P CHAN
NOTARY PUBLIC, STATE OF ILLINOIS
MY COMMISSION EXPIRES 6-20-94